IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 844 OF 2002

Ankush Abasaheb Holkar .. Appellant

versus

The State of Maharashtra .. Respondents

...

Mr.Milind Deshmukh for the appellant.

Mr.A.M. Shringarpure for the respondents.

CORAM : V.M. KANADE, J

DATED : 9th September 2004.

ORAL JUDGEMENT :-

1. The appellant is challenging judgement and order passed by the second Addl. Sessions Judge, Baramati in Sessions Case no.104 of 1999 dated 23rd July 2002. The accused was convicted u/s.363 and 366A of the IPC and sentenced to suffer RI for three years and six months respectively and also convicted

u/s.376 of the IPC and to suffer RI for seven years.

2. The prosecution case is that the accused was working with the father of the prosecutrix as a mason. The father of the prosecutrix was a carpenter and at the relevant time, the accused and the father of the prosecutrix were engaged by the owner to construct a residential house. The prosecution case is that on 10th September 1999. The accused approached the prosecutrix and asked her to accompany him. He assured her that he had taken permission of her father. The accused took her by truck to Jalgaon, Taluka Baramati. The accused purchased a dress for the prosecutrix from a shop and thereafter, he took her to his paternal aunt at Takali in a S.T. bus. He told her cousin maternal uncle that he had married the prosecutrix and thereafter on the next day, he took the prosecutrix to Shrigonda to the house of the paternal aunt of the accused where they stayed for one day. He told his paternal aunt that he had performed second marriage with the prosecutrix. Then on the 15th, he took the prosecutrix from Shrigonda to Jeur to his maternal brother. He purchased a green saree for the prosecutrix at Shrigonda and on the next day, he

took the prosecutrix to village Raver where the daughter of the paternal aunt of the accused was residing. He stayed there with the prosecutrix for two days and thereafter, he took her to his house at Daund and from Daund, he took her to Kedgaon where the parents of the accused resided along with his wife, sons and daughters. He informed his family members that he had performed second marriage with Ashwini - the prosecutrix. The prosecution case is that during this period, he had sexual intercourse with the prosecutrix without her consent and she had given her consent as she was threatened by the accused. A police complaint was lodged by the father of the prosecutrix and the accused was arrested at his residential house where the prosecutrix was present. Thereafter, a complaint was lodged by the father of the prosecutrix that the daughter was kidnapped by the accused and that the accused had raped her without her consent. The prosecution examined 11 witnesses in support of their case and the accused was convicted u/s.376, 366A, 363 and sentenced to suffer RI for 7 years, 3 years and 3 years respectively.

3. The appellant has preferred this appeal

challenging the said judgement and order. It was submitted by the learned counsel appearing on behalf of the accused that apart from the evidence of the medical certificate about the age of the prosecutrix, the prosecution has not produced any evidence regarding her actual date of birth and even her School leaving certificate is not brought on record. It was submitted that prosecution had miserably failed in proving that the prosecutrix was minor at the time of the incident. It was submitted that the evidence of the prosecutrix does not show that she was compelled to marry the appellant or to have sexual relations with her and therefore, the ingredients of section 366A were not satisfied. He further submitted that the trial Court had convicted the accused u/s.376 by solely relying on the evidence of the prosecutrix when the medical evidence did not support the prosecution version. He further submitted that the statement of the relatives with whom the appellant stayed along with the prosecutrix were not recorded by the police. He submitted that from the evidence on record, it was very clear that the prosecutrix had willingly accompanied the accused and she was of an age to understand the consequences of her action and in the

absence of concrete evidence to show that she was minor, the appellant was entitled to be given the benefit of doubt.

4. The learned counsel appearing on behalf of the State however vehemently opposed the said submissions made by the learned counsel appearing on behalf of the appellant. He submitted that the evidence clearly suggested that the accused had induced a minor girl and had kidnapped her on the pretext that he will marry her and had therefore, committed an offence of kidnapping and rape. He submitted that the prosecutrix was found in the house of the accused and therefore, the case of kidnapping was proved beyond reasonable doubt. He submitted that the evidence of the prosecutrix that the accused had committed rape is clearly established as she has stated in categorical terms that the accused after threatening her had committed rape on her. The respondent submitted that there is no reason to interfere with the findings given by the trial Court and therefore, the appeal was liable to be dismissed.

5. The prosecution has examined 11 witnesses.

PW no.1 is the prosecutrix Ashwini Dattatraya Sutar. She has stated that prior to her marriage, her name was Ashwini Kedar and she passed the VIIth Std. She has stated that the accused was working as a mason along with his father and that on 10th August 1999 when she had gone to the water tap to fetch water, the accused came near the water tap and told her that he had talk with her father and that he had permitted her to accompany the accused. She has stated that thereafter the accused took her to the S.T. stand and they went to Supa and thereafter, she was taken to Jalgaon, Baramati where the accused purchased a dress for her and from there, he took her to Takali to the house of his sister and informed her that he had performed second marriage with the prosecutrix. She has stated that she resided with the accused during the said period and finally took her to her house at Bori Pardhi. The accused told his parents and his wife and children that he had performed second marriage with the prosecutrix. She has stated that the accused committed sexual intercourse with her forcibly at her house at Bori Pardhi. This was repeated on the next night at about 9.00 p.m. On the third day, her parents came along with the police and the accused

was arrested. In her evidence, she has stated that her date of birth is 3th September 1984. In the evidence of the prosecutrix, the only inference which can reasonably be drawn that the prosecutrix had travelled with the accused without any complaint and that the accused had taken her to his relatives at various placed and had finally taken her to his house where he lived with his parents and first wife and had introduced her as his second wife. From 10th August 1999 till 26th August 1999, the prosecutrix stayed with the accused, she did not make any complaint. The prosecutrix has not stated anywhere that the accused had threatened her with any deadly weapon. It is difficult to believe therefore that the prosecutrix had travelled with the accused against her own free will.

6. The prosecution has examined Dr.Suhas - PW no.7, Dr.Sambhaji - PW no.6 and Dr.Sou Manik PW no.5 in order to bring on record the medical evidence. PW no.5 Dr.Manik has stated that Ashwini was brought to her hospital for medical examination on 27th August 1999 and on physical examination, she did not find any external injury in her body including her private parts. She has stated that the samples of

blood and vaginal swab, vaginal smear, public hairs, nails were collected and sent for Chemical Analysis. She has given an opinion that the prosecutrix were subjected to sexual intercourse. In the cross-examination, she has stated that there was no injuries on her person. PW no.6 Dr.Sambhaji has stated that he took X-rays of Ashwini - prosecutrix for determination of her age and gave an opinion that the age of the prosecutrix was between 12 - 14 years. In the cross-examination, the Doctor has admitted that the margin of error can be three years on either side. PW no.7 Dr.Suhas who examined the accused on 1.9.1999 has stated that no scratch marks was found on the body of the accused. The blood and other samples of the accused were taken, sealed and sent to the police for obtaining Chemical Analyser's report. From the evidence of the three doctors, it is apparent that no injuries were found either on the accused from the prosecutrix. The doctor has given opinion that she was 12 to 14 years on the basis of the X-ray report. However, it is admitted that the margin of error would be three years on either side. From the medical evidence, there is no indication that there was a forcible sexual intercourse with the prosecutrix. The only

question which falls for consideration is whether the prosecutrix was a minor at the time when the said offence was committed. According to the doctor, her age was between 12 to 14 years. However, he has admitted in the cross examination that there is a margin of error of three years on either side. The prosecution has not produced on record the birth certificate of the prosecutrix or even the School Leaving Certificate to prove that she was a minor. The prosecution has examined PW no.2 Rangnath Kedar, father of the prosecutrix. He has stated that she was a student of Shahaji High School, Supe and that she had failed in the VIIIth Std. The prosecution could have produced the School Leaving Certificate or the birth certificate through this witness. However, no evidence has been adduced in respect of the age of the accused. In fact, in the entire evidence of PW no.2 he has nowhere mentioned the date of birth of the prosecutrix. In the cross-examination, he has candidly admitted that he could not tell the date of birth of his daughter. A suggestion was made to this witness that his present wife Pramila was his second wife and that the prosecutrix was harassed by step mother and therefore, she had left the house on her own accord.

This suggestion however, has been denied. The fact remains that no evidence has been adduced by the prosecution in respect of the age of the prosecutrix. PW no.3 Pramila Ankush Kedar who is examined as a mother of the prosecutrix also does not state the age of the prosecutrix. The two Investigating Officers who have investigated the case also do not state whether any steps were taken by them to find out the real age of the prosecutrix. The Chemical Analyser's report also is not of any assistance to the prosecution. Under these circumstances, the prosecution has not conclusively proved that the prosecutrix was minor. However, the medical evidence of the Doctor suggest that her age was between 12 to 14 years with a margin of error of three years on either side.

7. The fact however remains that though there is no other evidence adduced by the prosecution to produce her birth certificate in order to establish her exact date of birth, her medical evidence clearly indicates that the prosecutrix was a minor and even if the benefit of 3 years is given, so far as the age is concerned, her age at the highest would be 17 years. The prosecution therefore, has

in my view succeeded in establishing that the accused had committed offence of section 366A r/w sec.376 of the IPC because though the prosecutrix may have given her consent but in view of the fact that she being a minor, consent would not be of any assistance to the accused. The conviction of the accused therefore, is confirmed.

8. However, so far as the sentence is concerned, in my view, the accused is entitled for a lesser punishment from the one which is already awarded to him by the trial Court. The prosecutrix in this case had travelled with the accused to various relatives of the accused and had stayed with him. She had not complained about the ill-treatment or harassment to any of the relatives of the accused. The accused had introduced her as his wife and had thereafter taken her to his house. Though this conduct does not absolve the accused from the commission of the offence, yet it can be considered as one of the mitigating circumstances for the purpose of reduction in sentence. The accused is in jail from 26.8.1999 and has already undergone 5 years of sentence. The prosecutrix also is happily re-married which is evident from her own deposition.

Under these circumstances, the sentence therefore, is reduced to the one which the accused had already undergone.

9. In the result, the appeal is partly allowed. The conviction is confirmed. The sentence however is reduced from 7 years to the one already undergone by the accused. The appellant to be released forthwith unless he is otherwise required in any other case.

10. Appeal is partly allowed in the above terms.

V.M. KANADE, J